IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. J. GODDARD, as General Receiver of the Property of the Duwamish Mill Company, a Corporation,
Plaintiff in Error,

vs.

THE CASUALTY COMPANY OF AMERICA, a Corporation,
Defendant in Error.

No. 1599.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant in Error

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STATEMENT.

The insurance policy involved in this suit was one indemnifying the assured against *loss,* not against *liability,* and the amended complaint specifically alleges in paragraph X (Rec., p. 6) that defendant in error had undertaken to insure the Duwamish Mill Company "against all *loss* from common law or statutory liability for damages" on account of certain injuries. The policy also provides that the only action that may be brought against the insurer shall be one for *damages,* as set forth in paragraph XII of the amended complaint (Rec., p. 9). Nowhere in the amended complaint is there an allegation that the Duwamish Mill Company, or the plaintiff in error, has sustained any *loss* or *damages* by reason of the injury to Baker. It is alleged that, pursuant to an order of the court, the receiver issued a receiver's certificate in the sum of $6,764.06, which was a lien on all the assets of the company, but it is not alleged that there were any assets, or that the certificate was actually worth anything, for, as a matter of fact, it was not.

The issuing of the certificate did not in any way change the lien upon the assets of the insolvent, if there were any assets. The judgment rendered was an obligation upon the corporation and its receiver when appointed. While the obligation was put into a little different form it was not paid, the nature of the lien was not changed, and the obligation remained the same.

The only allegation in the amended complaint on this point is that the defendant in error "became and now is indebted unto the plaintiff (plaintiff in error) as receiver as aforesaid in the sum of $6,000.00" (Rec., p. 10), which is merely a conclusion of law and not an allegation that any loss had been suffered. Furthermore, the amended complaint does not allege that Baker ever presented his claim to the receiver for allowance or that it was allowed, or that there was any necessity whatever for issuing the receiver's certificate. The policy particularly provided, as shown by the amended complaint (Rec., p. 8) that the assured should not "settle such claim, save at the cost of the assured." The amended complaint does not allege that the defendant in error ever consented to the issuing of the receiver's certificate.

ARGUMENT.

The lower court very properly sustained the demurrer to the amended complaint, for each of the grounds specified is well taken, and we believe that a brief citation of authorities will show that the amended complaint is demurrable.

I.

THE AMENDED COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

It is the well settled law in this country, and particularly in the Federal Courts, that under a policy such as the one in question here, which agreed to indemnify against *loss* and not against *liability,* no action can be maintained against the insurer until the assured has actually suffered a *loss.*

In *Allen vs. Aetna Ins. Co.*, 145 Fed. 881, the Circuit Court of Appeals for the Third Circuit enters into an elaborate review of the authorities. In this case, after the date of the accident upon which the suit was brought, the assured was placed in the hands of a receiver, and the plaintiff was unable to recover anything against the assured and sought to hold the insurance company in garnishment proceedings. The court say:

"The counsel for the insurer contend that the policy of insurance is a contract of pure indemnity against actual loss sustained by the assured, and that it is not a contract by which the insurer guaranteed the payment of any obligation or liability of the assured. The distinction between a contract to indemnify against *loss* and one to pay a *liability* has often been pointed out. Some of the cases on the subject are referred to in the opinion of the learned judge who tried this case, see 137 Fed. 136. But the counsel for the plaintiff in error, not denying the reasonableness of this distinction, contend that in the present case the policy of insurance is a contract to pay a liability and not a mere contract of indemnity against loss. This contention is based on the language of the second and third clauses of the 'General Agreements' of the policy. The legal effect of these clauses can be understood only by reading them in connection with the first and seventh clauses."

In *Cushman vs. Fuel Company*, 98 N. W. 509, the Supreme Court of Iowa holds that under a policy of insurance indemnifying an employer against a "loss actually sustained and paid in satisfaction of a judgment after the trial of an issue," that an injured employee has no right to maintain a suit in equity to recover the amount of his judgment from the insurance company, since there was no breach of the covenants and no liability on the part of the insurer until the judgment against the employer had been actually paid.

In *Finley vs. Casualty Co.*, 83 S. W. 2, the Supreme Court of Tennessee passed upon a similar policy to the one in the case at bar. The court construed the provisions of the policy placing the control of the litigation in the hands of the insurance company, including any settlement or adjustment of loss, and clause seven which provides that no action shall lie against the company unless brought by the assured himself to reimburse him for a loss actually paid, and the court say:

"There is a difference between the effect of a policy which insures directly against liability and one that insures against *loss* or *damage* by reason of liability. Under contracts of the first description, the amount of the policy up to the extent of the liability incurred by an employer on account of an accident to an employee becomes immediately, upon the happening of the event on which the liability depends and the giving of such notice as the policy provides for, an asset of the assured, which, in the absence of any provisions to the contrary in the policy, may be assigned by him or taken for his debt, subject of course to the making of such proofs to perfect the demand as the policy may provide for. *Un-*

der policies of the second kind, to which the one before us belongs, the amount of insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy. The rules above stated will be found illustrated and discussed in the following authorities: As to characteristics of two kinds of contracts, respectively, 65 N. W. 353; 56 Pac. 1096; 63 N. E. 414; 54 Atl. 395. As to notice: 66 N. E. 481; 57 N. E. 458; 50 N. E. 516. Under neither class of these policies is the employee treated as in privity with the parties to the contract. Under each, the contract is held to be one between the company and the master and for the benefit of the latter."

In *Frye vs. Electric Company*, 54 Atl. 395, the policy under construction was practically the same as the one construed by the court in *Finley vs. Casualty Company*, and the court say:

"We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the Gas Company to indemnify that company against loss from liability for damages on account of bodily injury accidentally suffered by an employee and caused by the negligence of the assured. The use of the word 'indemnify' shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability. There can be no reimbursement, when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guarantee the Gas Company's liability for negligence to its employees. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. The difference between a contract of indemnity and one to pay legal liability is, that upon the former an action cannot be brought and recovery had, until the liability is discharged, whereas upon the latter, the cause of action is complete when the liability attaches."

A case in point is *Moses vs. Travellers' Ins. Co.*, 49 Atl. 720 (N. J.), in which it is held:

"That not the amount of the employee's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible,"

and in the opinion this very apt language is used:

"The lamp company (assured) has paid, but it has paid with property, and it remains to ascertain in money the amount of the payment."

This doctrine might be supported by numbers of other authorities, but counsel for plaintiff in error virtually concede that this is the law in their brief. On page 5 of their brief they say:

"In view of the recent authorities, plaintiff in error does not contend that payment and satisfaction is not a prerequisite to his right of action, but, on the contrary, expressly recognizes that it is an essential, and bases his claim entirely upon the ground that in issuing the certificate he complied with the policy requirements, at least so far as the sufficiency of his compliance can be determined upon demurrer."

Again, on page 6 of their brief it is claimed that payment "in any other consideration of *value* would be sufficient to make the insurer liable"; and on page 7 they admit that the defendant in error would only be liable for the actual value of the receiver's certificate, and argue that it must have been worth something. There certainly can be no such presumption in favor of the allegations in the amended complaint. It was incumbent upon the plaintiff in error to state the whole of his cause of action, if he had one, and he could not merely allege that the judgment in question had been satisfied upon the receipt of a receiver's certificate without alleging that this had some value. As we have already pointed out, the policy provides that the insurer shall only be liable in case an action be brought "by the assured personally for *damages* sustained by the assured in paying and satisfying such final judgment." The word "loss" and the word "damage" as used in an insurance policy are synonymous.

Chippewa Lumber Co. vs. Phoenix Ins. Co., 44 N. W. 1055.

To these words "loss" or "damage" the contract adds the modifying clause "sustained by the assured." There is no ambiguity about the meaning of any of the words used, and the intention of the contracting parties is clear. In such a case the courts have no power to make a different contract.

The amended complaint shows conclusively that no loss or damage was ever suffered by the *assured*, for no attempt to even pay the judgment was made prior to the appointment of the receiver. There can, therefore, be no cause of action against the defendant in error if the terms of the policy are given any weight; but, assuming that the word "assured" in this connection might also include the entity represented by its receiver, so far as the amended complaint is concerned it would be impossible for the court, or anyone else, to determine whether or not that entity had been damaged in any particular. It is elementary that in an action for damages a complaint that does not allege the amount of the damages suffered is demurrable in spite of the fact that damages in a given sum may be claimed in the prayer. It is not sufficient in a personal injury action to allege that the plaintiff lost a leg through the negligence of the defendant and pray for damages in a given sum without alleging somewhere in the body of the complaint that the plaintiff had been damaged in such sum. This principle is so well known that we shall refrain from citing any authorities. As according to the above citations the law is well settled that in order to recover on a policy like the one in the case at bar some loss or damage must have been suffered by the assured, and as plaintiff in error in his brief to all intents and purposes admits that such is the law, the amended complaint did not state a cause of action, for the reason that it only showed affirmatively that the assured cor-not only showed affirmatively that the assured corporation suffered no loss, but failed to allege the hands of the receiver.

The policy also provided that the assured should not "settle such claim save at the cost of the assured." There is no allegation in the amended complaint that plaintiff in error ever consulted the defendant in error in regard to issuing the receiver's certificate. In the absence of any necessity compelling the payment of the judgment recovered by Baker, it was a clear violation of the terms of the policy for the receiver on his own responsibility to go out of his way and issue a receiver's certificate. The interests of the insurer and assured in matters of this kind are supposed to be identical. The insurer is simply to reimburse the assured for any loss that he may sustain, and of course the latter is not supposed to voluntarily incur a loss, but to do all in his power to prevent one. It is on this supposition that policies of this kind are written. If Baker had presented his claim to the receiver and received his *pro rata* out of the assets, if there were any, then, if at all, the defendant in error might have been bound to reimburse the receiver; but that is as much as the receiver could lawfully do in the case at bar. In the absence of any assets he had no right to make any sort of a payment of Baker's claim, as he could not have been compelled to do so.

The court, therefore, very properly sustained the demurrer to the amended complaint for the reason that it failed to allege that any loss had been suffered by the assured, and for the further reason that it failed to show any necessity for the payment of the judgment without the consent of the defendant in error. None of the cases cited by plaintiff in error on this point, found on pages 8 to 13 of his brief, assert any different doctrine. They are either cases in which valuable commercial paper was given in satisfaction of the judgment, thereby creating a loss, or reinsurance cases which have no similarity at all to the case at bar, for in the latter the reinsurer is liable for the loss whether the original insurer is solvent or not. None of these cases assume to announce any different doctrine from that contended for by the defendant in error in this case which is supported by the authorities heretofore cited, and even if the case of *Seattle & S. F. R. Co. vs. Maryland Casualty Co.,* recently decided by the Washington State Supreme Court, could possibly be held to announce a different doctrine, the Federal Courts are not bound by the decisions of the State Courts in matters of general law such as this is.

The foregoing in regard to the issuance of the certificate and its legal effect has been upon the theory that a court might conclude that there was some change in the legal relations between the real plaintiff in error, Baker, and the insolvent corporation. May we analyze this situation for a moment. A judgment was rendered and affirmed by the Supreme Court of the State of Washington in favor of Baker and against the insolvent corporation. The mandate was entered in the Superior Court at Seattle, and then the matter lay dormant for some eighteen months. Then, and without any notice to the defendant in error, or without notice to anyone, Goddard, the receiver, issued a receiver's certificate, which, in effect, states that a judgment was rendered against the insolvent corporation and in favor of Baker for a given number of dollars with costs, and that the instrument was issued as an acknowledgment that the judgment was and is an obligation against the corporation. Did this change the nature of the obligation, or was it in any sense, or could it be construed in any way as a payment? We think that must be answered in the negative. The receiver did nothing that changed the situation, nor did he incur any obligation that did not exist before. He by the act assumed no new burden nor did he part with anything of value. In fact, he made no obligation, he only certified to a condition.

For the reasons stated in the foregoing paragraph, we feel confident in asserting that the authorities cited by plaintiff in error to the effect that the giving of a promissory note in payment have no effect in this case, because no such instrument was issued. By the law the judgment debt was a lien upon all the assets, if any, of the insolvent corporation, and it was not a preferred lien. The issuance of the certificate did not change the legal status of the claim, nor of Baker. He and the claim remained the same.

We admit that had the receiver parted with any money, even very small, or large, in satisfaction of the judgment, and suit then been brought within the time provided in the policy, the defendant in error would be liable for that amount. As the receiver did not part with anything of value, did not obligate himself in any way, except to affirm in writing the obligation placed upon him by law as the trustee of the insolvent corporation for the benefit of anyone having a claim against the trust, then there was no *loss* or *damage*, and for that reason he has no right of action, because upon submitting the matter to a jury under the statement made in the complaint he must recover nothing, because he parted with nothing and nothing would be the result. This conclusion is deduced from the statement on page 7 of plaintiff in error's brief, wherein counsel say, quoting Webster, that payment means "the act of paying or giving compensation." There was no "paying"; there was no "giving compensation."

II.

PLAINTIFF IN ERROR IS WITHOUT LEGAL RIGHT TO MAINTAIN THIS ACTION AGAINST THE DEFENDANT IN ERROR.

The first portion of the argument on this point might well have been included under the argument of the preceding point, to the effect that the amended complaint did not state facts sufficient to constitute a cause of action. As already mentioned, the amended complaint recited the provisions of the policy of insurance which limited the liability of the insurer to actions brought *by the assured personally.* This action is brought by the receiver of the assured and not by the assured. If the assured in this case had been an individual and had died prior to the commencement of the action, it is clear that this provision of the policy would have prevented an action by his legal representative. What distinction in principle can there be between such a case and an action instituted by a receiver of a defunct corporation? We can see none. The assured did not have to accept such a policy if it did not want to. It could have insisted on a policy without this provision, and then the insurer could have done as it saw fit about executing a different policy, but nothing of the kind was done, and it was expressly stipulated that the assured *alone* should have the right of action. It is well known that in effecting insurance of all kinds the insurer invariably relies to a great extent on the personality of the insured. Certain individuals or corporations can obtain insurance where others cannot in cases in which identical physical conditions prevail; and policies of fire insurance commonly provide that any change in the ownership of the insured property without the consent of the insurer will avoid the policy. This has been uniformly held to be a reasonable provision. Why should not the same principle be applied to an employer's indemnity policy? Perhaps the insurer had in mind, when this provision was inserted in the policy, that the assured corporation might be placed in the hands of a receiver who, as the tool of the injured employee, might attempt a fictitious payment of the judgment against the corporation in order to benefit the employee and not the corporation; and undoubtedly this provision was inserted to defeat the liability of the company, if such a contingency should arise. This is precisely what has taken place in the case at bar. The assured corporation was insolvent and had no assets whatever. Under such circumstances it was not necessary for the receiver to pay Baker anything, much less to issue a receiver's certificate, which is only allowable in cases of urgent necessity, as where money must be raised in order to preserve the property of the insolvent company. If, therefore, the receiver is allowed to bring this ction it will be in direct violation of the express and unambiguous terms of the policy. In other words, the court would be imposing a different contract upon the defendant in error from that which the parties actually made. This case was instituted and has been regarded by the parties as an action at law, and there is no reason for any other than a strict legal construction of the plain wording of the policy. If it is to be regarded as an equitable suit, the writ should be dismissed under a recent holding of this court.

Thomson vs. Travelers' Ins. Co., 161 Fed. 867.

In reality the case at bar and the one last cited are identical in their objects, although the receiver was the plaintiff in this case. He is, however, as will appear from the amended complaint, only nominally plaintiff and is evidently suing wholly in the interests of Baker, the injured employee. Under the authority last cited, it would seem that this writ of error ought to be dismissed, if the court looks at the substance rather than the mere form. However, in any event, it seems clear that the demurrer to the amended complaint was properly sustained on the further ground that the receiver of the assured corporation had no right to institute this action.

III.

THE ACTION WAS NOT COMMENCED WITHIN SIXTY DAYS AFTER THE RENDITION OF THE FINAL JUDGMENT IN THE EMPLOYEE'S SUIT.

The final judgment in the suit brought by Baker was rendered October 8, 1906, and the complaint in this case was not filed until February 13, 1908. As already pointed out, the policy provided that "the company shall not be liable under this policy unless an action to enforce such liability be brought within sixty days from the date of the entry of a final judgment against the assured." This was not done, and plaintiff in error attempts to excuse the delay of about fifteen months by claiming that the provisions of the policy are inconsistent and that if construed literally might under given circumstances prevent the assured from recovering anything at all. The case cited by counsel for plaintiff in error on pages 15 and 16 of their brief is not at all similar to the case at bar. In this case the provisions of the policy referred to did not require anything unreasonable. There was nothing to prevent the assured from bringing an action within sixty days after the entry of a final judgment. It is a reasonable provision, one the insurer had a right to incorporate in the policy and one that should now be given effect. If as in the case cited by counsel for plaintiff in error certain provisions of the policy would prevent the assured from complying with other provisions, then, of course, all could not be enforced, but that is not the case here. After final judgment there was no reason in the world why the assured should wait for anything, much less for such an unreasonable length of time. All the courts have uniformly sustained similar provisions in insurance policies and hold that where the action is not commenced within the time limited in the policy it is barred, as will be shown by the following citations:

O'Laughlin vs. Union Central Ins. Co., 11 Fed. 280;

Vette vs. Clinton Fire Ins. Co., 30 Fed. 668;

Kettenring vs. Northwestern, etc., Assn., 96 Fed. 177;

Thompson vs. Phenix Ins. Co., 136 U. S. 287, 297;

Riddlesbarger vs. Hartford Ins. Co., 7 Wall. 386, 389;

People vs. American Steam Boiler Ins. Co., 41 N. Y. Suppl. 631.

Plaintiff in error argues that forfeitures are not favored in law. That is true, but it is not a forfeiture in any sense of the word when a plaintiff neglects to bring an action within the time provided in his contract; and the law is well established that contracts of insurance, as other indemnity agreements, are to be strictly construed.

On page 17 of their brief counsel for plaintiff in error contend that the cause of action did not accrue until after payment. That might or might not be true, and still it would not vitiate the provisions of the policy requiring the suit to be brought within sixty days after final judgment. If such an argument were sound the assured might wait fifteen or twenty years before paying the judgment and then attempt to hold the insurer in spite of the provisions of the policy.

Plaintiff in error further contends that the appointment of a receiver suspends the limitation imposed by the policy. This, of course, is not the law and the cases cited by them do not so hold. The case of *Jackson vs. Fidelity & Casualty Co.* simply holds that under the facts alleged in that case it was impossible for the receiver to discover the fraud sooner, and that therefore it was impossible for him to institute the action before he did. That is not the case here. So far as the amended complaint shows, the receiver knew as much about the material facts when he was appointed, or within a few days thereafter, as he does now. There was nothing to prevent his issuing his so-called certificate the day after the final judgment was rendered and bringing his suit within the sixty days.

We, therefore, insist that the lower court properly sustained the demurrer to the amended complaint on each of the several grounds urged; that the judgment of dismissal was right and should be affirmed.

Respectfully submitted,

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